Supreme Court, U.S.
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In The

Supreme Court of the United States

In re THOMAS M. RETTIG

On Petition For A Common-Law Writ of Certiorari To
The United States Court of Appeals For
The Sixth Circuit

PETITION FOR A COMMON-LAW WRIT OF CERTIORARI

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68 pgs

QUESTION PRESENTED FOR REVIEW

Whether this Court should exercise its discretionary powers to grant and issue a common-law writ of certiorari authorized by 28 U.S.C. § 1651(a), *writs,* in order to provide adequate relief to the petitioner Thomas M. Rettig who is entitled under the Due Process Clause of the Fifth Amendment to the U.S. Constitution and under § 1415(e)(2) of the Education for All Handicapped Children Act of 1975 (Act), as affirmed in *Rowley* (1982), to the appellate review--which the Sixth Circuit Court of Appeals and the Supreme Court have denied him--of his case brought under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution and under the Act and under Part 84 implementing Section 504 of the Rehabilitation Act of 1973, as amended, against respondents Board of Education of the State of Ohio and Kent City School District and their officials named as respondents in this petition.

LIST OF ALL PARTIES

Petitioner: Thomas M. Rettig, a citizen of the United States who was born a ***child handicapped by autism;***

Eva O. Rettig, his mother;

Respondents: Kent City School District; EHA 1970-2002 ***local education agency***; and

Donna G. Lightel, In her Official Capacity as Superintendent, Kent Public Schools; and

Michael J. Chrin, In his Official Capacity of Director, Child Study and Special Education, Kent Public Schools; and

Board of Education of the State of Ohio, EHA ***State education agency;*** and

Franklin B. Walter, In His Official Capacity as Superintendent for Public Instruction of the State of Ohio.

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PETITION FOR A COMMON-LAW WRIT

Petitioner Thomas M. Rettig most humbly prays that this Court issue a common-law writ in order to review his case and to provide him the fair and complete remedy due him in accordance with all applicable law.

OPINIONS AND ORDERS

The Decision of the U.S. Court of Appeals for the Sixth Circuit (C.A.[6]) appears at App(endix) A to the petition and is unpublished. The Opinion of the U.S. District Court for the Northern District of Ohio appears at App B and is unpublished.

JURISDICTION

On 11/05/99 the C.A.(6) denied rehearing. App C. On 03/20/00 the Supreme Court of the U.S. (S.C.) denied the Rettigs' timely #99-7720 petition for writ of certiorari filed under 28 U.S.C. § 1254, and on 05/01/00 it denied them rehearing. On 10/02/00 the S.C. denied Rettig its process in forma pauperis and dismissed his #99-10160 petition for writ of common-law certiorari filed under 28 U.S.C. § 1651, and on 11/27/00 it denied rehearing. On 03/19/01 the S.C. ordered him off its pauper docket and dismissed his #00-7895 petition for common-law writ. On 05/21/01 the S.C. denied his #00-1555 petition for common-law writ, and on 06/25/01 it denied rehearing. On 10/01/01 the S.C. denied his #01-163 petition for common-law writ, and on 01/07/02 it denied him rehearing. On 04/15/02 the S.C. denied his #01-1268 petition for common-law writ.

Rettig's appeal to this Court is neither frivolous nor malicious. He fervently believes that he is entitled to appellate review and relief. Jurisdiction is invoked under the U.S. Constitution's Fifth

Amendment's Due Process Clause and under 28 U.S.C. § 2106 and under 20 U.S.C. § 1415(e)(2) of the Education for All Handicapped Children Act of 1975, as affirmed in *Hendrick Hudson Dist Bd of Ed v. Rowley,* 458 US 176, 206-07 (1982) and under 28 U.S.C. § 1651 *writs* in accordance with S.C. Rule 20 *Procedure on a Petition for an Extraordinary Writ.*

U.S. CONSTITUTION AND STATUTES INVOLVED

App F contains the text of the following relevant law: U.S. Con: Due Process Clause of the Fifth Amendment and Due Process and Equal Protection Clauses of the Fourteenth Amendment, 42 U.S.C. § 1983 & § 1986, the Education for All Handicapped Children Act of 1975, 20 U.S.C. 1400, *et seq.,* 1986 amendment to § 1415(f) *EFFECT OF EHA ON OTHER LAWS,* Part 84. implementing Sec 504 of the Rehabilitation Act of 1973, as amended, *Nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from federal financial assistance;* and OH's *ASSURANCE OF COMPLIANCE WITH PART 84* which Ohio appended to its 1977 plan/application for federal funds under the Act and filed with the Office for Civil Rights.

STATEMENT OF THE CASE

Rettig's case against respondents Board of Education of the State of Ohio (OH) and Kent City School District (Kent) and their named officials began in 1970 and continues to this day. His claims arise under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution, under the Education for All Handicapped Children Act of 1975 (Act) and under the Rehabilitation Act of 1973, as amended. (Part 84.37 *Nonacademic services).* In 1982 Chief Justice Rehnquist reviewed, for all handicapped children of the U.S., including Rettig, the Act's policies, procedures, and objectives and found

them constitutional. *Bd of Educ of the Hendrick Hudson Central School Distr v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d690 (1982). § 1415(e)(2) of the Act/*Rowley* accords Rettig the right to appellate court review and relief. In 1984 the S.C. ruled that the Act "is the exclusive avenue through which the child and his parents or guardian can pursue their claim." *Smith v. Robinson,* 104 S. Ct. 3457 (1984) at 3470.

Neither the C.A.(6) nor the S.C. has ever accorded Rettig the appellate review due him under the Fifth Amendment specifically required for him under the Act/*Rowley*. He seeks the writ of common law authorized by 28 U.S.C. § 1651(a).

JUSTIFICATION FOR ISSUANCE OF THE WRIT

In accordance with Rule 20, *Rules of the S.C.,* Rettig's petition shows that the *writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.*

(I.) THE WRIT WILL BE IN AID OF THE COURT'S APPELLATE JURISDICTION.

The basis for subject matter jurisdiction in the D.C. is 28 U.S.C. §1331. The D.C.'s Order was issued on 10/14/97. App B. The timely appeal in the CA(6) was under 28 USC §1291. On 08/12/99 the CA(6) entered its Order. App A. On 11/05/99 it denied rehearing *en banc* and panel rehearing. App C. On 03/20/00 the S.C. denied Rettig's timely #99-7720 petition for a writ of certiorari under 28 USC § 1254; and on 05/01/00 it denied rehearing.

Part V *Procdure* of Title 28 *Judiciary and Judicial Procedure* accords the S.C. the power to *issue all writs necessary or appropriate in aid* of its appellate jurisdiction *and agreeable to the usages and*

principles of law. 28 USC §1651, *writs*. The S.C. has rejected Rettig's petitions for a common-law writ of certiorari in various ways. *See* Jurisdiction, p. 1. Rettig firmly believes that he has lawfuly brought before the S.C. the C.A.(6)'s totally unfair Order dismssing his unreviewed federal rights, and that he is entitled to the appellate review and *Determination* in accordance with 28 U.S.C. §2106 which provides as follows:

> The S.C. or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

(II.) EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THE SUPREME COURT'S DISCRETIONARY POWERS

OH and Kent have denied Rettig the *free appropriate public education (FAPE)* defined at § 1401(18) and guaranteed him under § 1412 *Eligibility/Rowley* and they and their named officials have discriminated against him on the basis of his handicap--autism--in the federally assisted program wherein they all benefit. In violation of Part 84 implementing § 504 of the Rehabilitation Act of 1973 they have denied him any and all Part 84 benefits, including the Part 84.37 *Nonacademic services.*

The *FAPE* due Rettig consists of the delivery of *special education* and *related services* tailored to his unique educational needs, including *diagnosis*. Those needs are identified in the Act's *Multi-factored evaluation* (*M-FE)* in accordance with federal regulations and state standards which must be conducted by Kent

at least every three years. Kent denied Rettig the *M-FE* which was to have served as the basis for the development and annual review of his ***individualized educational plan (IEP)***. Without the mandated *MF-E*, Rettig's *IEP* and annual reviews were ***inappropriate*** and meaningless for him. *See* § 1412 *Eligibility*, App F-4.

Kent denied Rettig the ***diagnosis*** due him in 1970 under Standard EDb-215-09 (***Child study services)***, (1966), and Kent denied him the public Part 84.38 ***Preschool educational program***.

1971-1974 Kent provided Rettig no *IEP* and no Part 84.37 ***Nonacademic services***. Kent claimed it had no class for him and denied him the ***procedures*** due him under Std. EDb-215-13 ***Legal dismissal from school attendance*** (1966). Only Kent could initiate them, and without them, he had no way of reaching the OH Department of Education's role and function in his public school enrollment based upon its ***determination of*** Rettig's ***capacity***.

When Kent finally enrolled Rettig on the campus of Kent State University in 1974, where he remained until 1978, ***OH's Plan for the Education of the Handicapped adopted in 1973*** was fully in effect. It provided for the ***comprehensive education program*** for each and every Ohio child who was handicapped, regardless of severity, in accordance with the ***assessment procedure*** due each child prior to his ***placement***. Kent denied Rettig the required pre-placement evaluation of his educational needs to serve as the basis for the ***comprehensive education program*** addressing both the behavioral ***treatment of autism*** and the remedial ***instruction*** due him under the ***plan***. Kent further denied him any and all Part 84.37 ***Nonacademic services***. Kent denied Rettig the ***procedures*** due him under Std. EDb-215-13 ***Legal dismissal from school attendance*** (1973) which neither he nor his parents could initiate in order to reach OH.

In April of 1977 ***OH's Stds. for M-FE, Least Restrictive Placement, and Individualized Educational Plan*** took effect. Kent never conducted the *M-FE* due Rettig under Std 3301-51-

18(C.)*M-FE* to serve as the basis for the development and annual reviews of the *IEP* due Rettig under Std 3301-51-18(D.) *Placement* based upon the annually required ***written placement team conference reports***. They do not exist in Rettig's educational file. Further, Kent continued to deny him any and all Part 84.37 *Nonacademic services*. Admin Rec.

On 11/12/79 OH affirmed Kent's 1970-1979 denials and denied him the *independent decision* due him under § 1415(c.) to access the (then future) *IEP* and Part 84.37 *Nonacademic services* due him.

On 10/01/77 the Act's provision for *Impartial due process hearing* took effect. *See* 121a.506. Rettig's 02/28/78 *admin(istrative) compl(ain)t* against 1970-1979 Kent finally reached OH in 1979. On 10/12/79 OH directed the respondent Superintendent for Public Instruction of the State of OH (Walter) to accord Rettig the *independent decision* due Rettig under § 1415(c.) *the officer conducting such review shall make an independent decision upon completion of such review*. Walter refused so to do and, when informed, OH refused to require Walter to perform his duty by Rettig. On 11/12/79 OH affirmed Kent's 1970-1979 denials of the *IEP* and *nonacademic services* due Rettig and OH refused to require Kent to conduct the *MF-E* due Rettig under § 1412 *Eligibility* to serve as the basis for the (then future) *IEP* and *nonacademic services* due him. Admin Rec.

On 06/13/83 OH affirmed Kent's 1979-1983 denials and denied Rettig the *independent decision* due him under § 1415(c) to access the (then future) *IEP* and *nonacademic services* due him.

Rettig's 09/29/82 *admin complt* reached OH in 1983. In 1981 Kent enrolled Rettig at Roosevelt High School and subjected him to some testing which his parents had rejected. Kent refused him

the *procedures* due him under § 121a.506 *Impartial due process hearing* to override the parental objections to Kent's proposed evaluation in order to accord Rettig the *evaluation procedures* due him under § 121(a)532. Kent's proposal and testing conducted denied Rettig the *MF-E* due him under § 121(a)532 and Std. 3301-51-18(C) *MF-E* (1977). The *M-FE* due Rettig does not exist. The annually required *IEP* reviews failed to meet Std. 3301-51-18(D.) *Placement* because the *placement team conference reports* due Rettig do not exist. Further, Kent continued to deny him his *nonacademic services*. Admin Rec. On 06/13/83 OH affirmed Kent's denials since his last appearance before OH. OH refused to require that Kent conduct the *MF-E* due Rettig to serve as the basis for his (then future) *IEP* and *nonacademic services*. Admin Rec.

On 04/06/87, OH, by and through its hearing officer--who denied Rettig *the independent decision* due him under § 1415(c)--affirmed Kent's 1983-1987 denials of the *IEP* and *nonacademic services* due him. OH denied him access to the (then future and current) *IEP* and *nonacademic services* due him under § 1415(e)(3) until the conclusion of court review under § 1415(e)(2).

Rettig's 12/12/86 *admin compl* reached OH in 1987. In 1984 the *reevaluation* under § 121a.534 was due Rettig. His parents rejected Kent's proposal because it failed him under § 121a.532 and under Rule 3301-51-02(D) *MF-E* (1982). Kent denied Rettig the *evaluation procedures* due him under § 121a.532. Without the MF-E upon which to base the *IEP* due Rettig, the *IEP* Kent provided him 1984-1987 was totally inappropriate and meaningless. Further, Kent continued to deny him the *nonacademic services* due him. On 04/06/87 the *officer* affirmed, without due process, Kent's 1983-1987 denials because the *independent decision* due Rettig under § 1415(c) does not exist.

While OH was considering further action for Rettig, on 05/30/87, he reached the age of twenty-two; Kent "graduated" him and refused the *IEP* due him in its entirety and continued to refuse the ***nonacademic services,*** including ***referrals*** and/or ***employment.*** On 07/31/87 Walter informed Rettig that OH would do no more for him. Admin Rec. OH thus affirmed, without due process, Kent's 1970-1987 Act-repugnant *IEP* and denials of the ***nonacademic services,*** and denied him the (then future) *IEP* and ***nonacademic services*** due him under § 1415(e)(3) "Stay-Put Provision" until the conclusion of court review under § 1415(e)(2).

(III.) ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY OTHER FORM OR FROM ANY OTHER COURT.

The federal courts have stripped Rettig--without the process due him under the Fifth Amendment and specifically provided for him under the Act/*Rowley*--of his Fourteenth Amendment rights to due process and equal protection specifically provided for him under the Act/*Rowley* to the *FAPE* and *nonacademic services.* The Act's § 1415(e)(2) provides the exclusive avenue to court review of Rettig's disputed *IEP* and *nonacademic services* and to accord him the appropriate remedy due him. *Smith v. Robinson,* 104 S.Ct. 3457 at 3470. (1984). Neither the C.A.(6) nor the S.C. has accorded Rettig the appellate review due him under the Act/*Rowley.*

The (C79-2234) D.C. and the (1983 and 1986) C.A.(6) had their jurisdiction limited to Rettig's 02/28/78 ***admin complt*** which did not--and could not--include OH's 11/12/79 § 1415(c.)-repugnant decision which denied him the equal protection without due process of law. **But** OH-79 was included in Rettig's 12/12/86 ***admin complt*** and brought to the federal courts in his C87-3492A complaint where it was unfairly dismissed without

opportunity to reach its merits. Only the S.C. has the power and *procedure* in accordance with its Rule 20 to provide the review and remedy due Rettig. The applicable review test is the following:

> Therefore, a court's inquiry in suits brought under Sec. 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? ....

Rowley, at 206-07.

The record shows that the C.A.(6) and the S.C. denied Rettig his right to appellate review of OH's § 1415(c.) *decisions* which denied Rettig the equal protection without due process.

(A.) On 08/25/81 the (C79-2234) D.C. denied review of OH's 11/12/79 decision due Rettig under § 1415(c.). OH denied him his right to the *FAPE* and *nonacademic services* without *the independent decision* due him under § 1415(c.) Because OH and Kent objected to court review, the court lacked jurisdiction since OH-79 had not--and could not have--been part of Rettig's *initial 02/28/78 admin complt* to which its jurisdiction was limited. On 11/08/83 the **C.A.(6) denied Rettig the appellate review for lack of jurisdiction**, and on 01/03/84 it denied him rehearing. App G-1. On 05/21/84 the **S.C. denied Rettig's #83-6494 appeal "for lack of jurisdiction"** and on 06/18/84 it denied rehearing.

(B.) On 03/10/86 the **C.A.(6) again denied appellate review** of OH-79. App G-11. On 06/30/86 the **S.C. denied review** of Rettig's #85-1843 appeal/certiorari.

(C.) On 12/12/86 Rettig included OH-79 and OH-83 in his ***initial admin complt*** which OH finally disposed of on 07/31/87. OH-87 denied Rettig the ***independent decision*** due him under § 1415(c.). OH-87 had not--and could not have--been included in Rettig's ***initial 12/12/86 admin complt***. Admin Rec. Rettig brought the ***admin rec*** in his C87-3492A complt. On 07/28/89 the D.C. entered its Order dismissing the complt and denying review/relief under misapplied legal defenses, including ***res judicata*** and ***failure to state a claim upon which relief can be granted.*** App E. On 08/29/90 the **C.A.(6) again denied appellate review** of OH-79 and OH-83 by unfairly barring review under ***res judicata***. The C.A.(6) **denied appellate review** of OH-87 by unfairly applying mootness to it. App D. The C.A.(6) returned Rettig's timely filed petition for rehearing. On 03/18/91 the **S.C. denied appellate review** by denying Rettig's timely #90-6388 petition for writ of certiorari, and on 05/13/91 it denied him rehearing.

(D.) On 08/07/91 the C.A.(6) unfairly denied Rettig's #91-3611 petition for writ of mandamus against the D.C. as follows:

> Here, the petitioner seeks to use the present mandamus petition as a second appeal of the district court's order dismissing his action. Having already received full appellate review before this court, he may not use the present petition in such a manner.

C.A.(6)'s 08/07/91 Order in #91-3611. On 01/13/92 the S.C. denied Rettig's #91-6384 petition for writ of mandamus, and on 03/09/92 it denied rehearing.

(E.) On 11/19/92, the C.A.(6) cited the above reason and unfairly denied Rettig's #92-3792 petition for a writ of mandamus ordering OH and Kent to "restore" his due process and equal protection rights.
On 03/29/93 the S.C. denied Rettig's #92-7761 petition for a

writ of mandamus, and on 05/17/93 it denied rehearing. Further, on 09/14/93 S.C. Chief Deputy Clerk Lorson returned Rettig's motion for leave to file a bill of complaint and complaint, citing lack of jurisdiction under Article II *(sic)* of the Constitution.

(F.) On 07/29/94 Rettig filed in the (C87-3492A) D.C. his Rule 60(b)(4) *The judgment is void motion* for relief from the D.C.'s 07/28/89 void dismissal Order affirmed by the 1990 C.A.(6). *See* Docket. The D.C. finally entered its unfair Order on 10/14/97. **It is void because it denied Rettig the process due him under the Fifth Amendment and under § 1415(e)(2)/*Rowley* and under Part 84.36 *Procedural safeguards.*** App B. On 08/12/99 the **C.A.(6) affirmed the void Order by unfairly denying Rettig the appellate review** of OH's § 1415(c.)-repugnant decisions. App A. On 11/05/99 it denied rehearing ***en banc*** and panel rehearing. App C. The **empty appellate procedure the S.C. extended to Rettig since then** is documented above. *See* Jurisdiction, p. 1.

Rettig clearly has the right to appellate review and to the remedy due him. The S.C. has the procedure and the power to accord him both. He most humbly prays its grace suffice him at this time.

PRAYER FOR RELIEF

(1.) That the S.C. declare that OH and Kent violated Thomas M. Rettig's rights under the Fourteenth Amendment and under the Act and under the Rehabilitation Act of 1973, as amended; and

(2.) That the S.C. order OH and Kent to provide Thomas M. Rettig the *FAPE in the least restrictive placement* which OH and Kent denied him 1970-1987, and

(3.) That the S.C. order OH and Kent to provide Thomas M. Rettig the Part 84.37 *Nonacademic services,* including ***transportation*** and ***supported employment***, which OH and Kent

denied him 1970-2002, and

(4.) That the S.C. order respondents to provide for Thomas M. Rettig hands-on-instructors who are qualified to teach him, in Kent community settings, including his home, place of employment, stores, recreational facilities--using only non-punitive techniques against his autism--those skills, including ***communication*** and ***adaptive behavior***, he needs in order to function as an adult with autism in those settings, and

(5.) That the S.C. order respondents to provide Thomas M. Rettig with any and all compensation/damages/relief the law allows. Rather than an award of money, he respectfully requests qualified instructors--supervised by qualified professionals--who teach him for as many years of his adult life as he needs in order to escape institutionalization, and

(6.) That the S.C. award all 1978-2002 litigation-related costs, including reasonable attorney's and expert witness fees, to Thomas M. Rettig, and

(7.) That the S.C. grant such further relief as it deems appropriate and just, including empowering the U.S. D.C. in Akron, Ohio, to enforce the S.C.'s Order for as long as Thomas M. Rettig needs it.

CONCLUSION

Thomas M. Rettig most humbly prays that this Court of last resort grant his petition and issue the common-law writ and provide him the fair and complete remedy under all applicable law.

Respectfully submitted,

Thomas M. Rettig

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No. 97-4299
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
AUG 12 1999
LEONARD GREEN, Clerk

THOMAS M. RETTIG; EVA 0. RETTIG,)
Plaintiffs-Appellants)
v.)
KENT CITY SCHOOL DISTRICT;) ORDER
DONNA G. LIGHTEL; MICHAEL J.)
CHRIN; BOARD OF EDUCATION OF)
THE STATE OF OHIO;)
FRANKLIN B. WALTER,)
Defendants-Appellees.)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 206 limits citation to specific situations. Please see rule 206 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

Before: NORRIS and SUHRHEINRICH, Circuit Judges; WEBER, District Judge.*

These pro se litigants appeal a district court judgment denying their motion for relief from a judgment filed pursuant to Fed. R. Civ. P. 59(e) and denying their motion to amend a previously filed motion for reconsideration. The case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

*Hon. Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

Seeking relief from judgment in the defendants' favor entered on July 28, 1989, and affirmed on appeal, see *Rettig v. Kent City Sch. Dist.*, No. 89-388 1, 1990 WL 125372 (6th Cir. Aug. 29, 1990), *cert. denied*, 499 U.S. 921 (1991), Eva and Thomas Rettig moved the district court in 1997 for relief from judgment on the ground that the district court's judgment deprived Thomas Rettig of his due process rights. The Rettigs also sought to amend a motion for reconsideration which they had filed on October 27, 1994. The district court denied the Rettigs' motion for relief from judgment because it was untimely and denied the Rettigs' motion to amend their 1994 motion for reconsideration because it was moot. The Rettigs appeal.

On appeal, the Rettigs reassert six arguments pertaining to Thomas Rettig's entitlement to benefits under federal statutes pertaining to the education of handicapped children. In addition, the Rettigs move the court for "an appropriate order remanding to [the] district court," purportedly under Rule 8(b)(7), Rules of the Sixth Circuit. Defendants Donna G. Lightel, Michael J. Chrin, and the Kent City School District move the court to dismiss the matter in its entirety.

The district court properly denied the Rettigs' motion for relief from judgment because it was untimely, and the court properly denied the Rettigs' motion to amend their 1994 motion for reconsideration because it was moot. The Rettigs sought relief from judgment under Fed. R. Civ. P. 59(e). This court reviews the district court's judgment denying a Rule 59(e) motion for abuse of discretion. See *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998); *Davis v. Jellico Community Hosp. Inc.*, 912 F.2d 129, 133 (6th Cir. 1990).

The district court did not abuse its discretion. Rule 59(e) motions must be filed within ten days after entry of judgment. Fed. R. Civ. P. 59(e). The Rettigs moved the court for relief more than eight years after the fact.

In addition, we conclude that the district court also properly dismissed the case because it is moot.

Accordingly, all pending motions are hereby denied, and the

district court's judgment is hereby affirmed pursuant to Rule 34(j)(2)(C), Rules of the Sixth Circuit, for the reasons set forth in the district court's memorandum and order of October 14, 1997.

ENTERED BY ORDER OF THE COURT

sig

Clerk

Appendix B-1

FILED
97 OCT 14 AM 10:10
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS M. RETTIG, et al.)	Case No. C87-3492a
Plaintiffs,)	Judge Ann Aldrich
vs.)	
KENT CITY SCHOOL)	
DISTRICT, et al.,)	ORDER
Defendants.)	

The Court has filed its memorandum and order denying Rettigs' motions for relief from this Court's July 28, 1989 judgment and to amend a 1994 motion for reconsideration. Therefore,

IT IS ORDERED that Rettigs' motions for relief from judgment entered on July 28, 1989 and to amend a motion for reconsideration filed in 1994 are denied; and the case is dismissed.

IT IS FURTHER ORDERED that this judgment is final and appealable.

Sig

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

FILED
97 OCT 14 AM 10:10
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS M. RETTIG, et al.	)	Case No. C87-3492
Plaintiffs,	)	
vs.	)	Judge Ann Aldrich
KENT CITY SCHOOL	)	
DISTRICT, et all.,	)	MEMORANDUM
Defendants.	)	AND ORDER

Thomas and Eva Rettig move this Court for relief from judgment in the defendants' favor entered on July 28, 1989. They also move to amend a motion for reconsideration which they filed in 1994 and believe still is pending before this Court. For the reasons that follow, the motion is denied.

I.

The Rettigs brought this action challenging the education provided to Thomas, Eva's handicapped son, under 20 U.S.C. § 1401 et seq., the equal protection clause of the fourteenth amendment to the United States Constitution, and various provisions of Ohio law. Among other things, the Rettigs claimed that Thomas was denied due process in the state proceedings to determine the educational program the state would provide to Thomas.

On July 28, 1989, this Court dismissed all counts of the complaint. On August 21, 1989, this Court denied the Rettigs' motion "for a new trial" brought under Rule 59. On August 29, 1989, this Court denied the Rettigs' motion for relief from judgment brought pursuant to 60(b). That motion had been

advanced on the ground that, inter alia, the July 28 order was void, in part because the order deprived Thomas of his due process rights. On September 18, 1989, this Court denied the Rettigs' motion for reconsideration, advanced on essentially the same grounds as the previously denied motion for relief from judgment.

The United States Court of Appeals for the Sixth Circuit affirmed this Court's July 28 order in all respects on August 29, 1990. The United States Supreme Court denied the Rettigs' petition for certiorari on March 20, 1991. The Rettigs filed two petitions of mandamus with both the Sixth Circuit and the United States Supreme Court from 1991 to 1993, which were all denied.

The Rettigs filed a motion to expedite their trial on August 5, 1994. The Rettigs filed another motion for relief from judgment under Rule 60(b), which this Court denied on September 8, 1994. On September 14, 1994, the Rettigs filed a motion for amendment of findings and a new trial, which the Court denied on October 13, 1994. On October 27, 1994, the Rettigs filed a motion for reconsideration under Rule 59(e), which the Rettigs believe is currently pending. On July 22, 1996, the Court denied Rettigs' motion to expedite their trial.

Over eight years after this Court first dismissed the Rettigs' complaint, the Rettigs move yet again for relief from judgment on the ground that this Court's order deprived Thomas of his due process rights. The Rettigs also move this Court to amend the motion for reconsideration which they filed on October 27, 1994 (Docket #44). The Rettigs wish to replace mistaken references in that motion to this Court's order of September 8, 1994, with references to the Court's order of July 28, 1989.

II.

Federal Rule of Civil Procedure 59(e) provides in pertinent part:

> Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Fed. R. Civ. P. 59(e). Here, the Rettigs bring this motion to grant relief from a judgment of this Court entered over eight years ago and to amend a motion which they filed almost three years ago.

The Rettigs' motion is not timely.

In addition, the Rettigs raise claims that have been fully litigated by both this Court and the Sixth Circuit. The issues raised in this motion are not new and were resolved years ago. The Court sympathizes with the pain Eva Rettig feels concerning Thomas' condition. However, this motion for relief from judgment states no ground on which it could be granted.

Accordingly, this motion is denied. The Rettigs' earlier motion for reconsideration, Docket #44, is denied as moot.

This order is final and appealable.

IT IS SO ORDERED.

Sig

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Appendix C

FILED
NOV 05 1999
LEONARD GREEN, Clerk

No. 97-4299
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS M. RETTIG; EVA O. RETTIG, Plaintiffs-Appellants,	)	
v.	)	ORDER
KENT CITY SCHOOL DISTR., ET AL., Defendants-Appellees.	)	

BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges; and WEBER*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Sig

Leonard Green, Clerk

*The Honorable Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

Appendix D-1

FILED
AUG 29 1990
LEONARD GREEN, Clerk

N0. 89-3881
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS M. RETTIG;	) ON APPEAL
EVA 0. RETTIG,	) FROM THE
Plaintiffs-Appellants,	) UNITED STATES
v.	) DISTRICT COURT
KENT CITY SCHOOL	) FOR THE
DISTRICT; et al.	) NORTHERN
Defendants-Appellees.	) DISTRICT OF OHIO

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 206 limits citation to specific situations. Please see rule 206 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

Decided and Filed

BEFORE: JONES and NORRIS, Circuit Judges; JARVIS, District Judge.*

PER CURIAM. Eva O. Retting, *(sic)* the mother of plaintiff Thomas M. Retting, *(sic)* a handicapped person, appeals the

*The Honorable James H. Jarvis, United States District Judge for the Eastern District of Tennessee, sitting by designation.

district court's order dismissing with prejudice this claim brought under the Education for All Handicapped Chidren *(sic)* Act. The district court, concluding that each of the causes of action set out in the complaint have already been fully litigated, recognized that the action was, in essence, a collateral attack upon a final judgment and, accordingly, dismissed the complaint on the basis of res judicata.

Having carefully reviewed the briefs of the parties and the record on appeal, we conclude that the district court's analysis found in its Memorandum and Order of July 28, 1989, was correct. Because we agree with the reasoning articulated by the district court as the basis for the dismissal, issuance of a written opinion by this court would be duplicative and serve no useful purpose.

Furthermore, it appears that the case is moot, since in view of Thomas' age, it appears that he is no longer entitled to the protections and benefits of the Act which limits eligibility to children between the ages of three and twenty-one years of age. Honig v. Doe, 484 U.S. 305, 318 (1988).

Accordingly, for the reasons stated, the orders of the district court dismissing the action and denying a new trial are affirmed.

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By

Sig

_____

Deputy Clerk

ISSUED AS MANDATE: September 20, 1990
COSTS: None

Appendix E-1

FILED
1989 JUL 28 AM 11:07
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS M. RETTIG, et al.	)	
Plaintiffs	)	
vs.	)	Civil Action
KENT CITY SCHOOL	)	NR. C87-3492A
DISTRICT, et al.	)	
Defendants	)	ORDER

The Court has filed its memorandum and order in this case. Therefore, IT IS ORDERED that the defendants' motions to dismiss are hereby granted. IT IS FURTHER ORDERED that the complaint is hereby dismissed with prejudice, each party to bear its own costs.

Sig

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

I hereby certify that this instrument is a true and correct copy of the original on file in my office. Attest: James S. Gallas, Clerk, U.S. District Court, Northern District of Ohio, By: *Sig Stamp*, Deputy Clerk.

Appendix E-2

FILED
1989 JUL 28 AM 11:07
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS M. RETTIG, et al.	)	
Plaintiffs	)	Civil Action
vs.	)	Nr. C87-3492A
KENT CITY SCHOOL	)	
DISTRICT, et al.	)	MEMORANDUM
Defendants	)	AND ORDER

ALDRICH, J.

This is the third in a series of federal court complaints brought by Eva Rettig on behalf of her son Thomas Rettig, a handicapped child, challenging the education provided to him under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401 et seq. (EAHCA), the equal protection clause of the United States Constitution and various Ohio state statutes and regulations. The Rettigs seek monetary damages and injunctive and declaratory relief.

Named as defendants are the Kent City School District, Donna G. Lightel, Superintendent of the Kent Public Schools, and Michael J. Chrin, Director of Child Study and Special Education for Kent Public Schools ("local defendants"). Also sued are the Board of Education for the State of Ohio and Franklin B. Walter, Superintendent of Public Instruction for the State of Ohio. ("state defendants"). Both the local and state defendants have filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Jurisdiction over these claims is based on 28 U.S.C. § 1331. For

the reasons set forth below, defendants' motions to dismiss are granted.

In reviewing the dismissal of a complaint under Fed. R. Civ. P. 12 (b)(6), this Court must construe the complaint in plaintiff 's favor and accept as true all factual allegations and permissible inferences therein. Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983), cert. denied, 469 U.S. 826 (1984) Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976). The complaint is only to be dismissed if the plaintiff could prove no set of facts in support of his claim which entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Court need not accept as true a legal conclusion couched as a factual allegation. Papasan v. Allain, 478 U.S. 265, 286 (1986).

However, pro se complaints, such as this one, are to be liberally construed and not to be held to the same stringent standard as formal pleadings drafted by attorneys. Haines v. Kerner, 404 U.S. 519, 520 (1972).

II.

Eva Rettig is Thomas' mother. Thomas was born on May 30, 1965. Thomas displays disabilities related to autism, and is also probably mentally retarded. He has resided in the Kent School District throughout his school age years.

The following is a brief history of the litigation in which the Rettigs have challenged the education the school district has provided to Thomas. They originally filed suit on November 30, 1979, against the Kent City School District. The complaint was later amended to add as defendants Kenneth Cardinal (then Superintendent of the school district), Michael Chrin, the State Board of Education of Ohio, and the State Superintendent of Ohio. Rettig v. Kent City School District, et al., 539 F.Supp. 768 (N.D. Ohio 1981). That complaint set forth ten causes of action dealing with Thomas Rettig's Individualized Educational Program (IEP) for the school year 1978-79 and raised claims relating to the years 1970-78. The Court ruled in favor of the defendants on all but two grounds. Defendants were ordered to amend an

administrative rule to be consistent with the EAHCA and to provide Thomas with one hour of extracurricular activities per week. The Court found that Thomas had been provided with a free appropriate education and denied plaintiffs' request for seven years compensatory education.

Both the Rettigs and the Kent City School District appealed this decision. The Sixth Circuit Court of Appeals affirmed the district court's rulings in favor of the school district, vacated the decision regarding extracurricular activities and remanded to the district court in light of Board of Education v. Rowley, 458 U.S. 176 (1982). Rettig v. Kent City School District, 720 F.2d 463 (6th Cir. 1983), cert. denied, 467 U.S. 1201 (1984). On remand, the district court found that the issues involving extracurricular activities were moot but otherwise affirmed its prior judgment. Rettig, Memorandum Opinion and Order, 79-2234 (N.D. Ohio January 26, 1984). On appeal, the court of appeals reversed the trial court and found that the issue of extracurricular activities was not moot because it was capable of repetition yet could evade review. The Sixth Circuit also reversed the judgment that extracurricular activities were required for Thomas. Rettig, 788 F.2d 328 (6th Cir. 1986), cert. denied, 106 S.Ct. 3297.

In the interim, the Rettigs filed a second suit in July 1983 challenging Thomas' placement for the school year 1983-84. The Kent City School District, Lightel, Chrin, the Ohio State Board of Education and Walter were also named as defendants in that lawsuit. Rettig v. Kent City School District, C83-2881 (N.D. Ohio, Lambros, J.). The Court dismissed that action in October 1986 after giving the Rettigs an opportunity to amend their complaint to state a cause of action as to the 1986-87 school year.

In 1987, Rettigs initiated the present litigation setting forth seventeen causes of action and challenging Thomas' educational placement for 1970 to 1987. The defendants have moved to dismiss Rettigs' complaint based on res judicata, the statute of limitations, failure to exhaust administrative remedies and mootness. It is appropriate to raise the issue of res judicata by

motion and in considering the motion, this Court can take judicial notice of its own records from prior cases. See, Westwood Chemical Co., Inc. v. Kulick, 656 F.2d 1224 (6th Cir. 1981); Harrington v. Vandalia-Butler Board of Education, 649 F.2d 434, 441 (6th Cir. 1981).

III.

The EAHCA mandates a "free and appropriate education" to all handicapped children of school age. Each child's educational needs are to be provided in conformity with the child's "individualized education program" (IEP). 20 U.S.C. §1401(18). The IEP is developed by the parents and educators working together and is to state the child's present level of performance, the objectives for improvement, the means of achieving those objectives and an objective criteria for determining success. The EAHCA also requires that to the maximum extent possible, handicapped children are to be educated with those who are not handicapped. 20 U.S.C. §1412(5)(B). The statute also guarantees parents procedural safeguards, including the right to examine all relevant records relating to the identification, evaluation and educational placement of the child, and written notice of any proposed changes in the child's placement/evaluation. 20 U.S.C. §1415(b). Parents may file written complaints regarding such placements and evaluations. Upon receipt of a such a complaint, the state educational agency must provide the parents with an impartial due process hearing. Id. Once these administrative remedies have been exhausted, the parents may appeal these determinations to federal district court. 20 U.S.C. §1414(e)(1) and (2). It is the results of these administrative proceedings that form the basis for the Rettigs' lawsuit.

IV.

Under the doctrine of res judicata, a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Federated Department Stores v. Moitie, 452 U.S. 394,

398 (1981) (citations omitted); Duncan v. Peck, 752 F.2d 1135, 1138 (6th Cir. 1985). The effects of res judicata are not altered by the fact that the judgment was in error or rested upon a legal principle which was subsequently overruled. 452 U.S. at 398. An erroneous judgment can be corrected only on direct appeal and cannot be attacked collaterally. Id. Judgments on the merits encompass both dismissals for failure to state a claim and summary judgments. Id. at n. 3; Westwood Chemical Co., Inc., v. Kulick, 656 F.2d 1224 (6th Cir. 1981).

To determine whether any two suits involve the same cause of action, courts determine the following: (1) whether the factual basis is the same in both cases; (2) whether the essential facts and issues have been similarly presented in both cases; (3) whether the evidence will suffice to sustain both verdicts; (4) whether the same right is infringed on by the same wrong; (5) whether the wrong for which redress is sought is the same in both actions; and (6) whether the two actions are so similar that a different judgment in the second would destroy or impair rights or interests established in the first. Plazzo v. Nationwide Mutual Insurance Co., 697 F. Supp. 1437, 1443 (N.D. Ohio 1988).

The defendants have moved to dismiss all counts on the basis of res judicata. This Court is compelled to agree with defendants that all but Count V must be dismissed on the grounds of res judicata as well as for failure to exhaust administrative remedies. Count V will be addressed separately.

Count I of the complaint alleges that the impartial due process hearing which the Rettigs requested and received in 1978-79 was deficient. The Rettigs assert that the documents relating to that due process hearing were not reviewed by the district court or the court of appeals in the earlier filed case. These claims relating to review of the 1979 due process hearing were squarely raised and adjudicated in the first action between these parties. The Rettigs' first cause of action merely attempts to collaterally attack the previous decisions of this Court and the court of appeals by alleging that the courts' reviews were incomplete. As discussed

earlier, res judicata specifically prevents this type of collateral attack. Furthermore, this Court is without jurisdiction to review a decision rendered by the court of appeals.

The Rettigs' second cause of action, although somewhat obscure, appears to allege that they were not provided impartial due process hearings for the years 1979-80, and 1980-81 and that this issue was not reviewed in either district court proceeding. There is nothing in the record to indicate that the Rettigs ever requested due process hearings for those years, or that such hearings were not held, or that their administrative remedies were exhausted. In fact, the Rettigs, in an exhibit, list only three requests which were made for due process hearings, none of which covered the years in question. This Court, in the first action, specially declined to reach the years 1979-80 and 1980-81 because administrative remedies had not been exhausted as required by 20 U.S.C. §1415(e). Rettig, 539 F. Supp. at 783-84. Count XII also raises claims concerning the years 1979-80 and 1980-81 and alleges that placement decisions for Thomas violated his right to equal protection.

The Rettigs tried to raise these claims in their two previous suits. They allege that in the second lawsuit the court lacked jurisdiction because of the appeals pending before the court of appeals. If the court in these two suits erroneously declined to review those years, the proper method of attacking such decisions was by way of a direct appeal, rather than by instituting new litigation. In the first action, the district court's decision not to review those years was affirmed by the court of appeals. Rettig, 720 F.2d 463. Assuming that administrative remedies had been exhausted, these claims could have been raised in the second lawsuit. The Rettigs are now barred by the doctrine of res judicata from raising these issues. Further, it appears that these claims continue to suffer from the failure to exhaust administrative remedies, and review continues to be improper. Smith v. Robinson, 468 U.S. 992 (1984); 20 U.S.C. §1415(e).

Plaintiffs' equal protection claims brought under Counts II and

XII must also be dismissed because the EAHCA provides the exclusive remedy for a child asserting the right to a free appropriate public education. Id. at 1013; Austin v. Brown Local School Dist., 746 F.2d 1161, 1164 (6th Cir. 1984), cert. denied, 471 U.S. 1053 (1985). The requirements of EAHCA cannot be circumvented by proceeding under the more general provisions of 42 U.S.C.§1983 and thus, the equal protection claims must be dismissed. Smith, 468 U.S. at 1012.

Count III alleges that the court of appeals' review of the administrative proceedings was incomplete because some exhibits were not reviewed by that court. This issue was also raised in the second lawsuit where the court held that "[a]s the district court does not exercise any review jurisdiction over higher court decisions, the undersigned Judge is without jurisdiction to pass on plaintiff's claim." Rettig, C83-2881, (N.D. of Ohio Oct .23, 1986). This Court is likewise without any authority to review and correct any errors that might have been made by the appellate court.

Count IV is a direct attack on the decision entered by the Court in the second suit. Specifically, plaintiffs allege the following:

> The judgment entered by Judge Lambros on Oct.23,1986 failed to provide procedural due process to plaintiffs when it sustained the defendants who denied equal protection to Thomas. Plaintiff's Complaint ¶67.

This is not even an attempt on the part of the Rettigs to state a new claim. It is a blatant attempt to collaterally attack another judgment and raise issues which should have been brought before the court of appeals. This Court is without jurisdiction to hear "an appeal" from another district court. Further, the doctrine of res judicata squarely bars such a claim.

Counts VI - XI challenge various evaluations and placements of Thomas for the school years 1970 through 1977. The Rettigs allege that these placements violated various state laws and also denied Thomas equal protection. The constitutionality of Thomas' placements and evaluations for the years 1971-74 were specifically

raised and rejected in previous litigation. Rettig, 539 F. Supp. 775-76. This Court will not relitigate those claims and finds them barred by the doctrine of res judicata. Claims for the years 1970, and 1975-77 are also barred. These claims could have been raised in either of the previous lawsuits. As will be discussed later, these claims are also barred by the statute of limitations.

Count XIII challenges the 1981 multifactored evaluation as violating Thomas' right to equal protection. The Rettigs objected to the evaluation at the time it was performed and "no hearing was held to override the objections filed by the parents." Complaint ¶118. The Rettigs claimed that Thomas' individualized educational programs for the years 1981-82, 1982-83, 1983-84, 1984-85,1985-86, and 1986-87 were based upon this earlier evaluation, and thus denied Thomas the free, appropriate education to which he was entitled. They allege that these actions violated Thomas' right to equal protection. As discussed earlier, this Court cannot entertain such an equal protection challenge. The Rettigs must first proceed under the EAHCA.

Count XIV involves the evaluation of Thomas which was proposed in 1984 by defendants. Initially, the Rettigs consented to the proposed evaluation of Thomas but then withdrew their consent. It is alleged that defendants then failed to institute "due process hearing procedures to override the parental objections." Complaint ¶128. As a result, the Rettigs allege that Thomas' IEP for the years 1984-85, 1985-86, 1986-87 failed to meet specified state standards and denied him equal protection under the law. This Court cannot consider the Rettigs' equal protection claim. They must first proceed under the EAHCA. Smith, 468 U.S. 992. It is not the defendants' obligation to provide such a hearing sua sponte. Parents who object to placements or evaluations of their children must present their complaints to the superintendent who can then hold an informal hearing. If the parents are still dissatisfied, they must present a formal complaint, in writing, to the board of education. It is that complaint which triggers an impartial due process hearing. Ohio Revised Code §3323.05.

Before initiating this suit relating to this 1984 evaluation, or any evaluation, the Rettigs must first exhaust their administrative remedies. 20 U.S.C. §1415(e). This has not been done and therefore count XIV must be dismissed.

Count XV alleges that since 1974 Thomas has been denied extracurricular activities which are a part of his free appropriate public education. This claim, at least through 1981, was squarely addressed and rejected by the court of appeals. Rettig, 788 F.2d at 332. The Rettigs allege that both district courts and the court of appeals failed to review this issue under the Rehabilitation Act. The court of appeals found that it was proper to limit review only to the EAHCA. Rettig, 720 F.2d 465. This Court does not have jurisdiction to review decisions made by the Sixth Circuit or by another judge of this court. Because the issue has already been raised and litigated, res judicata prevents a re-examination of the issue.

Count XVI is a "catch-all" which alleges that Thomas' placements for the years 1970 to 1987 were inappropriate in that they were based on evaluations which did not fully account for his behavior problems. This count fails for several reasons. First, issues relating to the years 1970-79 were raised and fully litigated in the first lawsuit. As to the years 1979 to 1987, those could have been addressed in the second lawsuit. Additionally, for most of the years in question, the Rettigs have failed to exhaust their administrative remedies. Only three due process hearings have been requested by the Rettigs covering the years 1978-79, 1981-82, and 1986-87. See, Docket Entry #14 (Volume of Exhibits filed by plaintiffs 4/11/88).

Count XVII seeks an award of damages for the expenses the Rettigs have incurred in educating their son and for attorneys fees and costs. Because the Rettigs have not prevailed on any cause of action, such an award would be improper.

IV.

Defendants have also moved to dismiss Counts I - IV, VI- XIII, and XVII as barred by the statute of limitations. Because of the

pro se nature of the Rettigs' complaint, it is difficult to ascertain the statutory basis for each of the above claims. These claims could be viewed as having been brought pursuant to EAHCA, 20 U.S.C. §1415, the Civil Rights Act, 42 U.S.C. §1983, or the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202. None of the above statutes contains a limitations period. For each of these statutes courts are to apply the most analogous state statute. Janzen v. Knox County Board of Education, 790 F.2d 486 (6th Cir. 1986) (applying Tennessee's three year limitations period to claims under EAHCA); Owens v. Okure, 109 S. Ct. 573 (1989); and Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098 (6th Cir. 1986) (declaratory judgments). The equal protection claims under §1983 need not be addressed because of the exclusive nature of the remedy under the EAHCA.

Local defendants argue that the appropriate limitations period for the claims under EAHCA is Ohio's fifteen day period governing appeals from agency determinations. O.R.C. §119.12. In Janzen, the court of appeals firmly rejected adoption of Tennessee's 60 day limitations period for appeal from agency determinations. 790 F.2d at 488. The court found such a short limitations period to be insufficient to protect important federal rights. The court of appeals also rejected the use of Tennessee's one year statute of limitations. Id. Accordingly, this Court finds the proposed fifteen day limitation period to be insufficient.

The state defendants propose adopting either Ohio's one or two year statute of limitations. Janzen requires that the statute of limitations for EAHCA cases be determined on a case by case basis by "considering the facts, the circumstances, the posture of the case and the legal theories presented." Id. at 487. Plaintiffs' pro se complaint is difficult to characterize. In Janzen, the plaintiffs sought reimbursement for the expenses of educating their child. The court treated their claim as an action to recover payment for services rendered but not paid for and applied Tennessee's three year limitations period. Id. at 487-489.

Here, the Rettigs seek reimbursement for past expenses, damages for the failure of the State to provide Thomas with an appropriate education, and injunctive relief requiring that further educational services be provided to Thomas. They allege that the State had a duty to Thomas which was breached either intentionally or negligently. It is unnecessary to characterize each and every one of the Rettigs' claims. Ohio's limitations period for torts involving bodily injury and intential torts is two years. Ohio Rev. Code §2305.10, .11. All other torts are covered by a four-year limitations period. Ohio Rev. Code§305.09. At most, the Rettigs are entitled to a four-year limitations period. No other Ohio limitations period is appropriate. Using a four-year limitations period, all claims involving causes of actions arising prior to December 31, 1983, are barred. It is appropriate to apply the same limitations period to the counts seeking relief under the Declaratory Judgment Act since it too required the use of the analogous state statute. The complaint was filed on December 31, 1987. Accordingly, Counts I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, and XIII, which involve claims arising before December 31, 1983, must be dismissed.

Count V of the Rettigs' complaint is based upon a request for an impartial due process hearing filed on December 12, 1986, challenging Thomas' placement for the years 1970 through 1987. The Rettigs' complaint was taken through several levels of state review. The impartial hearing officer found that no due process hearing was necessary because the issues presented were either res judicata between the parties or were inappropriate for a due process hearing. The Rettigs exhausted their administrative remedies and now seek review pursuant to 20 U.S.C. §1415(e). They allege that Ohio has failed to determine whether Thomas received a free appropriate education for the years 1970-87. This count is directed towards inadequacies in the review procedure, rather than towards the results of that procedure.

The defendants have moved to dismiss this count based on res judicata, statute of limitations, and failure to state a claim. The

local defendants argue that the fifteen day limitations for appeals from adverse agency decisions should apply to bar this claim. As discussed earlier, this Court does not find that limitation period sufficient to protect parental rights under the EAHCA or consistent with Sixth Circuit case law. The Court is persuaded that the doctrine of res judicata acts to bar a significant portion of this count. Claims relating to the years 1970-85 either were, or could have been raised in the two previous federal cases.

The only remaining school year is 1986-87. In July 1986, the district court granted the Rettigs an extension of time within which to amend their complaint to raise allegations concerning the 1986-87 school year. They failed to do so, and in October 1986 the Court dismissed their case. Following the dismissal, in December 1986, they requested an administrative due process hearing and proceeded to exhaust their administrative remedies.

Defendants argue that because the Rettigs were given the opportunity to raise issues before the district court concerning the 1986-87 school year, claims regarding that year are now barred. This Court disagrees. In the order of dismissal, the Court noted that the Rettigs had failed to submit an amended complaint raising a claim as to the 1986-87 school year. Thus that year was beyond the court's jurisdiction and there had been no showing that administrative remedies had been exhausted. Rettig, C83-2881 (N.D. Ohio October 26, 1986). Defendants argue that because the Rettigs had the opportunity to raise this claim, the doctrine of res judicata should apply. This Court is unpersuaded. The Rettigs could not have amended their complaint to state a cause of action for the year 1986-87. At the time the amendment was due, they had not yet exhausted their administrative remedies and thus, as the court noted, could not state a claim.

However, Count V fails for other reasons. The Rettigs state only that the "Order failed under federal law to determine whether nor not Thomas has received a public education meeting the requirements of" Ohio and federal law. They have not articulated why the decision of the hearing officer was incorrect. They have

not presented an issue for this Court to review on appeal. This Court cannot guess as to precisely what the Rettigs believe were the errors in that proceeding.

The Court has reviewed the Rettigs' request for an impartial due process hearing. Essentially, it raises the same issues as are presented by this lawsuit. It is twenty-eight pages in length and attempts to raise issues concerning placements and evaluations going back to 1970. No issue is joined which raises claims concerning the deficiency of the IEP for the 1986-87 school year. Instead, it is an attempt to relitigate all that has come before. There can be no error on the part of defendants in refusing to rehear stale claims.

The Court can sympathize with the anguish which Eva Rettig feels concerning her son's condition. However, this Court cannot sit to redetermine rights which have long since been litigated. Nor can this Court guess at what the school system should have done or why the decisions which were made (either as to substance or as to procedure) were inappropriate.

For the reasons stated above, defendants' motions to dismiss are hereby granted. Plaintiffs' complaint is dismissed with prejudice.

IT IS SO ORDERED.

Sig

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

I hereby certify that this instrument is a true and correct copy of the original on file in my office. Attest: James S. Gallas, Clerk U.S. District Court, Northern District of Ohio. By: *Sig* - Deputy Clerk

Appendix F-1

The following document appeared as *APPENDIX B* to OH's Application for EHA Funds:

- DEPARTMENT OF H., E., and W.
ASSURANCE OF COMPLIANCE WITH SEC 504 OF THE REHABILITATION ACT OF 1973, AS AMENDED

The undersigned (hereinafter called the "recipient") HEREBY AGREES THAT it will comply with section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), all requirements imposed by the applicable HEW regulation (45 C.F.R. Part 84), and all guidelines and interpretations issued pursuant thereto.

Pursuant to § 84.5(a) of the regulation [45 C.F.R. 84.5(a)], the recipient gives this Assurance in consideration of and for the purpose of obtaining any and all federal grants, loans, contracts (except procurement contracts and contracts of insurance or guaranty), property, discounts, or other federal financial assistance extended by the Department of Health, Education, and Welfare after the date of this Assurance, including payments or other assistance made after such date on applications for federal financial assistance that were approved before such date. The recipient recognizes and agrees that such federal financial assistance will be extended in reliance on the representations and agreements made in this Assurance and that the United States will have the right to enforce this Assurance through lawful means. This Assurance is binding on the recipient, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to this Assurance on behalf of the recipient.
This Assurance obligates the recipient for the period during which federal financial assistance is extended to it by the Department of Health, Education, and Welfare or, where the assistance is in the form of real or personal property, for the period provided for in §84.5(b) of the regulation [45 C.F.R. 84.5(b)].

The recipient: [Check (a) or (b)]

a. ( ) employs fewer than fifteen persons;
A73

b. (X) employs fifteen or more persons and, pursuant to § 84.7(a) of the regulation [45 C.F.R. 84.7(a)], has designated the following person(s) to coordinate its efforts to comply With the HEW regulations:
A74

Robert 0. Greer, Assistant Superintendent
Name of Designee(s) -Type or Print
C12 C42

Ohio Department of Education — 65 South Front Street
Name of Recipient -Type or Print — Street Address or P.O.Box
A12 A41 A42 A71

31-6402047 — Columbus
(IRS)Employer Identification Number — City
A1 A11 B12 B41

B1 B11 Ohio 43215
C1 C11 State Zip
B42 B71

I certify that the above information is complete and correct to the best of my knowledge.

June 20, 1977 — *Sig stamp*
Date — Signature and Title of Authorized Official
B72 B77 B78 Franklin B. Walter
Superintendent of Public Instruction

If there has been a change in name or ownership within the last year, please PRINT the former name below:

NOTE: The 'A','B', and 'C' followed by numbers are for computer use. Please disregard.

PLEASE RETURN ORIGINAL TO: Office for Civil Rights, H HEW, P. 0. Box S222, Washington, D.C. 20024.

Appendix F-3

CONSTITUTION AND STATUTES

U.S. CONSTITUTION, FIFTH AMENDMENT

No person shall... be deprived of life, liberty, or property, without due process of law;...

U.S. CONSTITUTION, FOURTEENTH AMENDMENT

Sec 1. ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 *Civil Action For Deprivation of Rights*

Every person who under color of any statute, ordinance, regulation, custom, usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 *Proceedings in vindication of civil rights; attney's fees*

...In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, ...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

20 U.S.C. § 1401, *et seq.*, *Education for all Handicapped Children Act of 1975*

§ 1401(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5). §614(a)(5) states: Provide assurances that the local educational agency or

intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually...

§ 1401(17) The term "related services" means transportation and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

§ 1412 *Eligibility* In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 613(b) in effect prior to the date of the enactment of the Education for All Handicapped Children Act of 1975 and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that...

(C) all children residing in the State who are handicapped regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related

services.

...(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 614(a)(5).

(5) The State has established (A) procedural safeguards as required by section 615...

(6) The State educational agency shall be responsible for assuring that the requirements of this part are carried out and that all educational programs for handicapped children within the State ...shall meet education standards of the State educational agency.

§1414 *Application* (a) A local educational agency or an intermediate educational unit which desires to receive payments under section 611(d) for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall— ...

(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually...

§1415 *Procedural Safeguards* (a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b)(1) The procedures required by this section shall include, but shall not be limited to—

...(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

...(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

...(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(f) *Effect of EHA on Other Laws* Nothing in this title shall

be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.

29 U.S.C. § 794. *Nondiscrimination under Federal grants* No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
Pub. L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394

Historical Note

Legislative history. For legislative history and purpose of Pub. L. 93-112, see 1973 U.S.Code Cong. and Adm. News, p. 2076.

..."However, the following year, in section 111(a) of the Rehabilitation Act Amendments of 1974 (Public law 93-516), Congress amended the definition of "handicapped individual" for purposes of section 504 and the other provisions of titles IV and V of the Rehabilitation Act so that the definition is no longer limited to the dimension of employability. For puropses of section 504 of the Act, a "handicapped individual" is defined as " any person who (A) has a physical or mental impariment which substantially limits one or more of such person's major life activities, (B) has a record of having such an impairment." With this amended definition, it became clear that section 504 was intended to forbid discrimination against all handicapped individuals regardless of their need for or ability to benefit from vocational rehabilitation services.

Section 504 thus represents the first Federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of

handicap. The language of section 504 is almost identical to the comparable nondiscrimination provisions of title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 (applying to racial discrimination and to discrimination in education on the basis of sex). It establishes a mandate to end discrimination and to bring handicapped persons into the main stream of American Life. The Secretary intends vigorously to implement and enforce that mandate.

FEDERAL REGISTER, VOL 42, NO 86- Wed., May 4, 1997
Title 45--Public Welfare
SUBTITLE A--DEPARTMENT OF HEW, GENERAL ADMINISTRATION PART 84--NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE.
AGENCY: Department of Health, Education, and Welfare.
ACTION: Final rule.
EFFECTIVE DATE: June 3, 1977.

84.1 *Purpose* The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity that receives Federal financial assistance.

84.3 *Definitions* As used in this part, the term:

...(k)"qualified handicapped person" means:

...(2) With respect to public preschool, elementary, secondary, or adult educational services, a handicapped person (i) of an age during which non-handicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under paragraph 612 of the Education of the Handicapped Act.

84.36 *Procedural safeguards* A recipient that operates a public elementary or secondary education program shall establish and implement with respect to actions regarding the

identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial due process hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

84.37 *Nonacademic services* (a) *General* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment...

84.38 *Preschool and adult education programs* A recipient to which this subpart applies that operates a preschool education or day care program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

Appendix G-1

TEXT OF OPINIONS
RETTIG v. KENT CITY SCHOOL DIST.

Cite as 720 F.2d 463 (1983)

Thomas M. Rettig, et at., Plaintiffs-Appellants, Cross Appellees,

v.

KENT CITY SCHOOL DISTRICT, Defendant-Appellee, Cross-Appellant,

and

Kenneth Cardinal, et al., Defendants-Appellees,

Nos. 81-4586, 81-3595.

United States Court of Appeals, Sixth Circuit

Argued June 80, 1983.

Decided Nov. 8, 1983.

Rehearing Denied Jan. 3,1984

Handicapped student and his mother petitioned for review of decision of the Ohio State Board of Education which affirmed hearing officer's decision in favor of school district on complaint of the student's parents questioning quality of education their son was receiving. The United States District Court for the Northern District of Ohio, Ann Aldrich, J., 539 F.Supp. 768, affirmed hearing officer's decision but directed school district to provide student with one hour of extracurricular activities each week, and the parties cross-appealed. The Court of Appeals, Krupansky, Circuit Judge, held that: (1) school district provided adequate in-service training under terms of the Education for All Handicapped Children Act; (2) specific programs requested by plaintiffs were not necessary to permit student to benefit from his instruction; and (8) the Act did not require the state of Ohio to maximize potential of the student commensurate with opportunity provided to other children.

Affirmed in part and vacated and remanded in part.

1. Schools ~148

The Education for All Handicapped Act did not oblige school district to provide in-service training to parents of handicapped student, and in-service training provided by the school district to

its employed staff was adequate. Education of the Handicapped Act, § 601 et seq., as amended, 20 U.S.C.A. §1401 et seq.

2. Schools ~148

District court properly refused to interfere with state of Ohio's implementation of its educational program as it related to handicapped student; specific programs requested by student's parents were not necessary to permit student to benefit from his instruction. Education of the Handicapped Act, 1601 et seq., as amended, 20 U.S.C.A.§ 1401 et seq.

3. Schools ~148

The Education for All Handicapped Children Act did not require that the state of Ohio maximize potential of handicapped child commensurate with opportunity provided to other children. Education of the Handicapped Act, § 601 et seq., as amended, 20 U.S.C.A. § 1401 et seq.

Edward G. Kramer, Floyd J. Miller, Cleveland, Ohio, for plaintiffs-appellants, cross-appellees.

Eva Rettig, pro se.

Dennis M. Whalen (argued), G. Frederick Compton, Jr., Dennis M. Whalen Co., L.P.A., Cuyahoga Falls, Ohio; Gary E. Brown (argued), Asst Atty. Gen., Columbus, Ohio, for defendant-appellee, cross-appellant.

Edward G. Kramer, Floyd J. Miller, Kramer and Associates Co., L.P.A., Cleveland, Ohio, amicus curiae on behalf of appellants.

Before LIVELY, Chief Judge, KRUPANSKY, Circuit Judge, and FEIKENS, District Judge*.

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*The Hon. John Feikens, United States District Judge for the Eastern District of Michigan, sitting by designation.

This is an appeal and cross-appeal from the final order of the District Court for the Northern District of Ohio in this action involving the education of a handicapped child.

The district court entered extensive findings of fact below and reference is made to that opinion for a full exposition of the background of this controversy. See, *Rettig v. Kent City School District*, 539 F.Supp. 768 (N.D.Ohio 1981). It is sufficient to restate here that Thomas M. Rettig (Thomas) is a severely handicapped teen-age child. Thomas displays symptoms of autism and is also believed to be mentally retarded.

In February of 1978 Thomas' parents requested a due process hearing pursuant to the Education for All Handicapped Children Act of 1975 (EHCA or Act) 20 U.S.C. § 1401 *et seq.*, questioning the quality of the education their son was receiving. A hearing was conducted before a Hearing Officer in accordance with § 1415(b)(2) of the Act. The Hearing Officer decided in favor of the Kent City School District and issued a comprehensive opinion on April 30, 1979. It was affirmed by the State Board of Education.

The initial complaint in this matter was filed in the District Court for the Northern District of Ohio on November 30, 1979. The complaint joined Thomas and his mother as parties plaintiff and named the Kent City School District as defendants. Plaintiffs, in the initial complaint, essentially essentially petitioned for review of the state decision pursuant to 20 U.S.C. § 1415(e)(2), [1] and also

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[1]. 20 U.S.C.§ 1415(e)(2) provides that any party aggrieved by the resolution of an administrative hearing under the Act: shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

asserted violations of the Rehabilitation Act of 1973,29 U.S.C. § 794. An amended complaint incorporated additional allegations of constitutional infringements under 42 U.S.C. § 1983 and joined, as defendants, the superintendent of the Kent City School District, the director of special education for the district, the State Board of Education of Ohio and the state superintendent of education.

The lower court, subsequent to duly conducted hearings in August of 1980, denied plaintiffs' request for a preliminary injunction. The trial court issued its final order in May of 1981, subsequent to a trial of the case on its merits.

The trial court upheld the administrative Hearing Officer's decision, concluding that: (a) the defendants had provided adequate inservice training for faculty and staff; (b) the defendants had devised and implemented a reasonable educational program for Thomas which would not be modified; (c) a twelve month educational program for Thomas was not required under the Act; and (d) continuous occupational therapy for Thomas was not a requirement of the Act.

The lower court did, however, direct the Kent City School District to provide Thomas with one hour of extracurricular activities each week and further decreed that the State Board of Education amend its rules to conform with federal regulations.[2] The lower court concluded, as a matter of fact, that plaintiffs had failed to prove their constitutional infringements. It also characterized the plaintiffs' claims arising under the Rehabilitation Act as merely restatements of EHCA charges and disposed of those charges by incorporating them into its resolution of the latter. Finally, the lower court declined to award attorney fees.

The plaintiffs appealed the trial court's decision insisting that Thomas was being denied a free appropriate education. The Kent

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[2]. Federal regulations mandate a final disposition of all appeals from decisions of Hearing Officers within 30 days of issuance thereof. 34 C.F.R. I 300.512 (1982). The State rules permitted a 60-day interval.

City School District cross-appealed from the lower court's order mandating the district to provide Thomas with one hour of extracurricular activities each week. The State revised its regulations in accordance with the lower court's order and did not appeal. See O.A.C. § 3301-51-02(6)(12)(f).

Initially, we conclude that the lower court's findings with respect to the constitutional claims are not clearly erroneous and we affirm the court's ruling as to those claims. This Court also agrees that, in this case, the plaintiffs' complaints purportedly arising under the Rehabilitation Act, with one exception, are resolved by the disposition of the EHCA claims. See 84 C.F.R.§ 104.33,104.36 (1982). Accordingly, this Court is confronted with only those issues joined under the EHCA. In considering the asserted violations of the EHCA the Court is directed to the Supreme Court's recent explication of the Act.

In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Supreme Court reviewed the policies, procedures and objectives of the Act. It also specifically identified and delimited a court's obligation in actions instituted pursuant to § 1415(e)(2). The Court stated:

> [A] court's inquiry in suits brought under § 1415(e)(2) is two-fold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 206, 102 S.Ct. at 3051 (footnotes omitted).

Plaintiffs urge that both inquiries should be answered in the negative. In addressing the procedural requirements of the Act the plaintiffs assert that the State failed to develop adequate programs for inservice training of teachers and support personnel as directed by the EHCA.

The EHCA specifically requires a State participating under the

Act to submit a plan incorporating, ***inter alia:***

> a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, ...

[1] The district court found that the defendants had developed and implemented a wide range of inservice training programs which satisfied the requirements of the EHCA. That conclusion is supported by the record.

Plaintiffs have argued, however, that parents should be included within the meaning of "support personnel" and therefore the Kent City School District was obliged to provide inservice training to the parents of Thomas. The legislative history, however, discloses that Congress intended the term "support personnel" to denote professional staff employed by the school system. The Senate Report, in discussing the Act's provision regarding inservice training, stated, in pertinent part:

> High quality educational services for all handicapped children will require a greater number of support personnel, as well as teachers. The supportive services should be provided by trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel.

S.Rep. No. 94-168, 94th Cong., 1st Sess. 34, ***reprinted in*** [1975] U.S.Code Cong. & Ad. News, 1425, 1457. Accordingly, plaintiffs' contention that "support personnel" should include parents is unfounded and this Court concludes that defendants provided adequate inservice training under the terms of the EHCA.

[2] The plaintiffs have challenged the quality of the educational program developed for Thomas in several respects. In sum, however, the plaintiffs' arguments merely reflect a difference of opinion as to the most effective teaching methods available to advance Thomas' education. Various experts testified as to an appropriate educational program for Thomas. The courts,

however, are not free to choose between competing educational theories and impose that selection upon the school system. As the Supreme Court admonished in *Rowley, supra* at 206,102 S.Ct. at 3051-52:

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." § 1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to §1415(e)(2).
>
> We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." ***San Antonio School District v. Rodriguez***, 411 US. 1,42[93 S.Ct. 1278, 1301, 86 L.Ed.2d 16] (1973). We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped.

> Therefore, once a court determines that the requirements
> Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

(footnotes omitted). This Court is of the opinion, therefore, that the lower court was correct in refusing to interfere with the State's implementation of its educational program as it related to Thomas. To the extent the plaintiffs requested the trial court to order the school district to include specific programs within Thomas' curriculum-- for example, summer classes and continuous occupational therapy-- this Court affirms the district court's denial of such relief inasmuch as the programs were not necessary to permit Thomas to benefit from his instruction.[3]

[3] The trial court ruled in favor of the plaintiffs in addressing the issue of Thomas' extracurricular activities. In granting this relief, the trial court relied on the following administrative regulation promulgated under the Act:

> §300.306 Non-academic services.
> (a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

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[3]. The lower court also ordered the School District to conduct a multi-factored evaluation of Thomas. The School District, in fact, had attempted to perform such an evaluation but his parents objected, charging that the basis of norm-referenced or standardized testing was inappropriate for autistic children. The evidence disclosed however that such testing was an important component of an overall evaluation. It was, therefore, reasonable to require the parents of Thomas, as a condition to receiving benefits under the Act, to permit the school district to perform an evaluation of Thomas. See, ***Vander Malle v. Ambach***, 673 F.2d 49(2nd Cir.1982).

34 C.F.R. § 300.306 (1982).[4] The regulation apparently adopts a standard designed to ensure that handicapped children are exposed to extracurricular activities on an equal basis with non-handicapped children.

In *Rowley*, however, the Supreme Court specifically rejected a construction of the EHCA which required "that States maximize the potential of handicapped children 'commensurate with the opportunity provided other children.'" *Rowley, supra* at 189, 102 S.Ct. at 3042, *quoting*, 483 F.Supp. 528 at 534.

The regulation and the lower court's opinion antedated the Supreme Court's opinion in *Rowley*. This Court therefore deems it appropriate to remand this issue to the district court for further consideration in light of the pronouncements in *Rowley*.[5]

In accordance with this opinion, the judgment below is AFFIRMED in all respects except that portion requiring the school district to provide extracurricular activities to Thomas which is VACATED and REMANDED for further consideration.[6] Each party shall pay its own costs.

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[4] The regulation was initially promulgated by the Secretary of Health, Education and Welfare and appeared at 45 C.F.R. § 1210.306. However, the functions of the Secretary of Health, Education and Welfare with respect to the Act were transferred to the Secretary of Education. Pub.L. No. 96-88 § 601, 93 Stat. 696. The regulation in issue, along with scores of others, was thereafter transferred to Title 34 and redesignated. 45 Fed.Reg. 77368 (1980).

[5] This last issue is the exception previously alluded to wherein application of the Rehabilitation Act could provide a resolution different from that achieved by application of the EHCA. See 34 C.F.R.I 104.37(1982). The lower court is free to address this issue on remand.

[6] Amicus curiae has briefed the Issue of attorney fees. In light of the remand, the attorney fee issue is not ripe for final resolution.

Appendix G-10

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Thomas M. Rettig; Eva 0. Rettig, Plaintiffs-Appellees, Cross-Appellants,
v.
KENT CITY SCHOOL DISTRICT, et al., Defendants-Appellants, Cross-Appellees.
Nos. 84-3167, 84-3187.
United States Court of Appeals, Sixth Circuit.
Argued Oct. 25, 1985.
Decided March 10, 1986.

Handicapped student and his mother petitioned for review of decision of the Ohio State Board of Education which affirmed hearing officer's decision in favor of school district on complaint of student's parents questioning quality of education their son was receiving. The United States District Court for the Northern District of Ohio, Ann Aldrich, J., 539 F.Supp. 768. affirmed, but directed school district to provide student with one hour of extracurricular activities each week, and the parties cross-appealed. After remand by the Court of Appeals, 720 F.2d 463, the District Court determined that matter had become moot as it concerned student, but reaffirmed its earlier decision ordering one hour of extracurricular activities per week, and parties cross-appealed. The Court of Appeals, Krupansky, Circuit Judge, held that under the Education for All Handicapped Children Act, school district was not obligated to provide extracurricular activities to student, where student, because of lack of interest and sporadic and recurring behavior, would receive no significant educational benefit from extracurricular activities.
Reversed.
See also, 94 F.R.D. 12.

1. Federal Courts ~ 12
To satisfy case or controversy requirement, actual controversy

must exist at all stages of review, and not simply on date action is initiated. U.S.C.A. Const. Art. 3, § 1 et seq.

2. Federal Courts ~ 12

Capable of repetition exception to mootness applies in exceptional situations where named plaintiff can support reasonable showing that he will be again subjected to complained of conduct.

3. Federal Courts ~ 724

Issue of whether providing handicapped student with one hour of extracurricular activities each week satisfied requirements of the Education for All Handicapped Children Act was capable of repetition, yet evading review, and thus, appeal from order reaffirming prior decision granting relief under the Act was not moot, even though relief was granted for a time long since concluded. Education of the Handicapped Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

4. Schools ~ 148(2)

The Education for All Handicapped Children Act does not absolutely require that handicapped child be provided each and every special service available to non-handicapped children; rather, applicable test is whether handicapped child's individualized educational plan, when taken in its entirety, is reasonably calculated to enable child to receive educational benefits. Education of the Handicapped Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

5. Schools ~148(2)

Regulation requiring that handicapped children be given equal opportunity for participation in extracurricular activities conflicts with the Education for All Handicapped Children Act, which only requires that child's individualized educational plan, in its entirety, be reasonably calculated to enable child to receive educational benefits. Education of the Handicapped Act, § 601 et seq., as

amended, 20 U.S.C.A. § 1400 et seq.

6. Schools ~148(2)

Under the Education for All Handicapped Children Act, school district was not obligated to provide extracurricular activities to handicapped student, where student, because of lack of interest and sporadic and recurring behavior, would receive no significant educational benefit from extracurricular activities. Education of the Handicapped Act, § 602(17), as amended, 20 U.S.C.A. § 1401(17).

Dennis M. Whalen; G. Frederick Compton, Jr. (argued), Dennis M. Whalen Co., L.P.A., Cuyahoga Falls, Ohio, B. Douglas Anderson (argued) Asst. Atty. Gen., Columbus, Ohio~for defendants-appellants, cross-appellees

Thomas M. Rettig and Eva 0. Rettig, *pro se*.

Before KRUPANSKY and MILBURN, Circuit Judges, and JOINER, District Judge.*

KRUPANSKY, Circuit Judge.

Appellant-Cross Appellee Kent City School District and Appellees-Cross- Appellants Thomas and Eva Rettig appeal from the district court's final order in this action which was initiated pursuant to the Education for All Handicapped Children Act of 1975. (EHCA or Act) 20 U.S.C. § 1400 et seq.

Thomas Rettig (Thomas) is a twenty year old handicapped child who manifests symptoms of autism. Thomas has, for a number of years, and is currently receiving special education services in the Kent City School District. He will continue to receive this special education until he is twenty-two years of age.

In February of 1978, Thomas' parents (Rettigs) requested a due process hearing pursuant to the EHCA, questioning the validity of the special education their son was receiving in the Kent City School District. In a comprehensive opinion dated April 30, 1979,

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*The Hon. Charles W. Joiner, District Judge, U.S.D.C. for the Easern District of Michigan, sitting by designation.

a state-appointed impartial hearing officer concluded that the Kent City School District was providing Thomas with a "free appropriate public education" as required by the Act. The State Board of Education affirmed the hearing officer's opinion.

Thereafter, Thomas and his mother, Eva 0. Rettig, commenced this action seeking review of the state decision pursuant to 20 U.S.C. 1415 (e)(2), asserting violations of the Rehabilitation Act of 1973, 29 U.S.C.. § 794, and alleging constitutional infringements pursuant to 42 U.S.C. § 1983. After a trial on the merits, the district court, 539 F.Supp. 768, upheld the administrative hearing officer's decision and concluded that the plaintiffs had failed to prove their asserted constitutional infringements. The lower court did, however, direct the Kent City School District to incorporate one hour of extracurricular activities each week in Thomas' 1981-82 Individualized Educational Plan (IEP).

The Rettigs appealed the trial court's decision, insisting that Thomas was being denied an appropriate free education. The Kent City School District cross-appealed from the lower court's order mandating the district to afford Thomas one hour of extra-curricular activities per week. This court, 720 F.2d 463, vacated that part of the district court's judgment concerning the extra-curricular activities to be made available to Thomas each week and remanded that single issue to the trial court for further consideration in light of the Supreme Court's decision in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). In all other respects, this court affirmed the district court's judgment.

On January 26, 1984, the district court decided that the matter had become moot as it concerned Thomas because the earlier order granted relief foı a time period, the 1981-82 school year, which had "long since concluded", but nonetheless, reaffirmed its earlier decision ordering one hour of extracurricular activities per week. This appeal and cross-appeal followed.

[1] Of initial concern to this court is the threshold issue of subject matter jurisdiction. Article III grants the federal courts jurisdiction over cases and controversies. To satisfy the case or controversy requirement, an actual controversy must exist at all stages of review, and not simply on the date the action is initiated. *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147 *reh'g denied* 410 U.s. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973).

The issue of mootness must, however, be considered by applying the doctrine of "capable of repetition, yet evading review" as enunciated in *Southern Pacific Terminal* Co. v . ICC , 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911).

[2] The capable-of-repetition rule applies in exceptional situations where the named plaintiff can support a reasonable showing that he will be again subjected to the complained of conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) citing *DeFunis v. Odegaard*, 416 U.S. 312, 319, 94 S.Ct. 1704, 1707, 40 L.Ed.2d 164 (1974).

In *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Supreme Court reviewed, under the provisions of the EHCA, a handicapped child's IEP for a schoolyear that had previously expired. Noting that the protracted period required to exhaust judicial review in most instances exceeds nine months, the Court stated that a federal court retained jurisdiction to grant relief pursuant to the EHCA where the alleged deficiencies in the IEP were "capable of repetition *as to the parties before it* yet evading review." *Rowley*, 458 U.S. at 186 n. 9,102 S.Ct. at 3040-41 n. 9 (emphasis added).

[3] As a handicapped child, Thomas is entitled to a public education under Ohio law until he attains the age of twenty-two. See, e.g., Ohio Rev.Code § 3328.01(A) and 3323.07. At oral argument, counsel for the Kent City School District indicated that

the school district would comply with the mandate of the Ohio statute. Accordingly, the issue of providing Thomas with one hour of extracurricular activities each week for the period of the School District's statutory mandate remains a viable issue that is capable of repetition, yet evading review. Because this case falls within a clearly defined exception to the mootness doctrine, this court invokes its jurisdiction to consider the substantive issue presented herein.

In disposing of the merits joined by this Court's mandate of August 25, 1981, the district court reaffirmed its previous order requiring that Thomas be afforded one hour of extra-curricular activities per week and concluded that its earlier disposition of the issue was correct and came within the pronouncements of the Supreme Court's decision in *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.s. 176, 203, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982).

The district court reasoned that 34 C.F.R. § 300.306, the regulation which addresses the subject of extra-curricular activities, was valid under *Rowley*. That regulation provides:

> (a) Each public agency shall take steps to provide nonacademic and extra-curricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.
>
> (b) Nonacademic and extra-curricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

The school district, however, argues that the regulation is invalid pursuant to the teachings of *Rowley* insofar as it mandates "equal opportunity" for participation in extra-curricular activities.

In *Rowley*, the parents of a deaf child brought suit under the EHCA insisting that their daughter should have been provided with a qualified sign language interpreter in all of her academic classes. Although the trial court found that the child was performing better than the average child in her class, it nonetheless concluded that the child had not been receiving a "free appropriate public education" because she had not been performing as well academically as she would have if she were not deaf. The Supreme Court reversed the judgment of the district court, concluding that the EHCA did not mandate state public education systems to ensure that each handicapped child be provided with special education services which maximize the handicapped child's potential commensurate with the opportunity provided to other children.

The *Rowley* Court indicated that by enacting the EHCA, "Congress sought primarily to identify and evaluate handicapped children and to provide them with access to a free public education." 458 U.S. at 200, 102 S.Ct. at 3048. The Court reasoned that a state could meet its obligation to provide a handicapped child with a free appropriate public education "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203, 102 S.Ct. at 3049. The Court further said that a handicapped child's IEP met the Act's substantive standards when it was "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207, 102 S.Ct. at 3051.

[4] After declaring that Congress had not intended to achieve "strict equality of opportunity or services" through the EHCA, the Court opined:

> The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States

> provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

Id at 198-99, 102 S.Ct. at 3047. Accordingly, the Act does not absolutely require that a handicapped child be provided each and every special service available to non- handicapped children. Rather, the applicable test under *Rowley* is whether the handicapped child's IEP, when taken in its entirety, is reasonably calculated to enable the child to receive educational benefits.

[5] 34 C.F.R. § 300.306, relied upon by the district court to mandate "an equal opportunity for participation in ... [extracurricular) activities", requires strict equality of opportunity, and accordingly is in conflict with the pronouncements of *Rowley*.

[6] Plaintiffs argue that the extra-curricular requirement imposed by the district court can be independently supported because the requirement was necessary to permit Thomas to benefit from his educational program. The Rettigs contend that Thomas' "free appropriate public education" should include activities required to assist him to "benefit from special education." 20 U.S.C. § 1401(17). However, the state appointed hearing

officer determined that because of Thomas' "sporadic and recurring behavior, including, regurgitation, lack of interest, self-stimulating activities and bladder accidents," he was unable to significantly benefit from extra-curricular programs. Accordingly, the school district was not obligated to provide extracurricular activities from which Thomas would receive no significant educational benefit.

In their cross-appeal, the plaintiffs advance several issues that were fully litigated in the 1981 district court proceedings and have been previously resolved on appeal to this court and the United States Supreme Court. Accordingly, the Rettigs' cross-appeal is hereby dismissed.[1] For the reasons stated herein, the judgment of the district court is REVERSED.

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[1] On March 12, 1985, the Kent City School District filed a motion to strike the joint appendix filed by the Rettigs and for leave to file a supplemental appendix. In an order dated May 2, 1985, this court denied the motion to strike, granted the school district leave to file a supplemental appendix, and referred to this panel defendant's motion to assess the costs of preparing the supplemental appendix to the Rettigs. Because the relevant documents contained in the supplemental appendix were also incorporated in the joint appendix, defendant's motion is hereby overruled.